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No. 73-853

# In the Supreme Court of the United States

OCTOBER TERM, 1973

SUSAN JILL FORBICETTA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner contends that a customs search of her clothing at the airport was improper, that the prosecutor violated a pre-trial stipulation, and that partiality of the trial judge denied her a fair trial.

Following a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of importation of cocaine and possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 952(a). She was sentenced to three years' imprisonment and three years of special parole on each count, the terms to run concurrently, with immediate eligibility for parole

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under 18 U.S.C. 4208(a)(2). The court of appeals affirmed (Pet. App. A).

The facts are not in dispute. Petitioner arrived at Miami International Airport on November 21, 1972, on a flight from Bogota, Colombia (R.T. 4, 6). After deplaning and claiming her single suitcase, she entered the customs area and was observed by customs officer Hicks (R.T. 26). While assigned exclusively to the airport for the previous year, Hicks had observed a number of people bringing narcotics into the country (R.T. 22).

Petitioner, a trim, attractive, young woman, was apparently traveling alone, had one bag, and stated that she had no liquor or other items requiring declaration (R.T. 26, 29). She was wearing a loose-fitting dress (R.T. 27), and when she bent over to pick up her suitcase Hicks observed that "you couldn't really see her figure." Hicks became "immediately suspicious of a young lady wearing a kind of a loose dress because my experience has shown that they are either carrying something or possibly concealing something * * *" (R.T. 27–28). After she passed through the customs line, Hicks questioned her. She said she had been in Bogota, Colombia, for about ten days on vacation to see a friend, but had no relatives there. She said she was an unemployed bank teller, and her passport listed her home as Brooklyn, New York (R.T. 29–31).

Hicks and other agents had noted a pattern of narcotics traffic from Bogota into Miami, in which large quantities of narcotics were smuggled by air from Bogota by young girls, usually wearing loose-fitting

clothing and traveling alone with little luggage and nothing to declare (R.T. 22–25). Moreover, Bogota is not considered a likely destination for vacationing young people, especially those with little money (R.T. 26, 31–32). He therefore asked petitioner to step into a windowless office for a private examination by two female customs inspectors (R.T. 31, 46). At the request of one of them, petitioner lifted her dress, revealing a slip (R.T. 9, 46, 47). The female inspectors could easily see something concealed under her girdle (R.T. 47, 51). The girdle was discovered to contain seven packets of white powder weighing about 2½ pounds. It was stipulated at trial that the powder was subsequently tested and found to be cocaine (R.T. 49, 52, 106).

1. Petitioner contends that the decision in this case conflicts with Ninth Circuit cases requiring a "real suspicion" on the part of customs agents before a "strip search" can be conducted. This Court has long ruled that border searches by customs officials are not governed by the usual Fourth Amendment standard of "probable cause," since the crossing of an international border provides sufficient reason to permit a search for aliens or contraband. *Carroll* v. *United States*, 267 U.S. 132, 154; *Boyd* v. *United States*, 116 U.S. 616, 623. See *United States* v. *McDaniel*, 463 F. 2d 129, 132 (C.A. 5); *Murgia* v. *United States*, 285 F. 2d 14 (C.A. 9); *Landau* v. *United States Attorney*, 82 F. 2d 285, 286 (C.A. 2). The Ninth Circuit has ruled that before a "strip search" may be made, there must be a "* * * subjective suspicion supported by objec-

tive, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law," *United States v. Guadalupe-Garza,* 421 F. 2d 876, 879 (C.A. 9.) See *Henderson* v. *United States,* 390 F. 2d 805, 808 (C.A. 9); *United States* v. *Johnson,* 425 F. 2d 630 (C.A. 9), certiorari dismissed, 404 U.S. 802. Here, the customs officer asked the female agents to conduct a private search only after observing petitioner's unusual appearance and determining the correlation between her Bogota trip and the pattern of narcotics traffic from Bogota to Miami. In such circumstances, Officer Hicks' suspicions were supported by "objective, articulable facts."

2. Petitioner also contends that the failure of the prosecution to adhere to a pretrial stipulation requires vacation of sentence under *Santobello* v. *New York,* 404 U.S. 257.

The circumstances surrounding the stipulation are as follows. After the suppression hearing and denial of petitioner's motion to suppress, defense counsel requested and the prosecutor agreed that the government's testimony at the suppression hearing would be proferred at trial as part of the government's case-in-chief. Defense counsel, on petitioner's behalf, also advised that petitioner would waive jury trial. This waiver of jury trial was prompted both by defense counsel's belief that there would be little other than the question of the chain of custody of the seized

cocaine for jury determination, and also by defense counsel's desire to avoid further strain and expense for his client (R.T. 71). The stipulation concluded with the following statement signed by prosecutor Ullman:

> I will recommend $2500 surety bond pending appeal and sentence of two years jail, if the P[re]S[entence]I[nvestigation] does not show anything unfavorable to the [defendant]. Tho[ugh] just a recommendation; the c[our]t may give up the maximum.[1]

At sentencing, the court called upon defendant and counsel to speak in mitigation and, without calling upon the prosecutor, imposed a three year sentence and set bond at $10,000 (R.T. 115–119). When defense counsel (R.T. 118–120) and prosecutor Boswell (R.T. 121) referred to the stipulation, the court called defense counsel a liar, fined him $100 (R.T. 119), and informed Boswell: "[Y]ou have no business making special agreements because I do not recognize them" (R.T. 121). Thereupon, Boswell explained that it was his understanding that the government's agreement was predicated upon an agreement by petitioner to enter a guilty plea (R.T. 122).

Here, unlike *Santobello,* there was no plea bargaining and guilty plea. Rather, petitioner was convicted after voluntary waiver of jury trial (R.T. 68–71). Nor

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[1] This stipulation is not part of the record. However, we have been informed that petitioner has accurately described the contents of the stipulation (Pet. 4). We are lodging with the Clerk of this Court a copy of the stipulation furnished to us by petitioner's counsel.

did Boswell's erroneous statement that the stipulation was conditioned upon a plea of guilty by petitioner affect petitioner's sentence or bond, since the court had already imposed sentence and fixed bond. Moreover, the court made it clear that it would not even consider any such agreement entered by defense counsel and the government.

3. Finally, petitioner contends that the court's animosity toward her attorney deprived her of a fair trial. As the court of appeals noted (Pet. App. 4), the case turned on a question of law, the reasonableness of the customs search. As that issue was unquestionably resolved in a proper manner, any personal animus toward the attorney could not have been prejudicial to petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

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